



**The Comptroller General
of the United States**

Washington, D.C. 20548

Arsenoff

Decision

Matter of: ESCO Engineering
File: B-234749
Date: June 22, 1989

DIGEST

1. Awardee's bid, which included a fixed, lump-sum price as required by the solicitation and took no exception to the specifications relating to boiler controllers of a specified manufacturer, constituted an unequivocal offer to comply with all material requirements of the solicitation and was, therefore, responsive.
2. Whether, in light of post-award statements attributed to the awardee, the awardee intends to perform in accordance with specifications is a matter of contract administration not to be reviewed by the General Accounting Office.
3. Allegation that awardee's bid price was too low does not give rise to a responsiveness issue.
4. Qualification of an offer to extend awardee's bid acceptance period did not take effect where award was made within the original bid acceptance period set forth in the solicitation.

DECISION

ESCO Engineering protests the award of a contract to West Canyon Boiler, Inc., under invitation for bids (IFB) No. GS-07P-89-JXC-0002, issued by the General Services Administration (GSA) for the replacement of boilers at the Wallace F. Bennett Federal Office Building in Salt Lake City. ESCO contends that West Canyon's bid was nonresponsive.

We deny the protest in part and dismiss it in part.

The IFB provided for bid opening on December 21, 1988, and contained a drawing note which required either the reprogramming of existing boiler controllers manufactured by

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Johnson Controls, Inc. if memory capacity was available or replacement of the existing controllers with a specified Johnson model. West Canyon became the apparent low bidder after the bid of another firm was withdrawn as the result of a mistake in bid. Following verification of West Canyon's own bid price and a determination of its responsibility, GSA awarded the firm a contract on February 16, 1989.

ESCO alleges that a substantial doubt exists as to whether the awardee's bid reflects an intention to meet the specifications relating to Johnson controllers, and submits that, therefore, West Canyon's bid should have been rejected as nonresponsive. In support of its contention, the protester notes that West Canyon's bid does not contain any reference, such as a price quotation, to Johnson controllers. ESCO has submitted an affidavit from a Johnson sales engineer who states that, on February 23, he contacted the awardee to find out why the firm had not sought a price quotation from Johnson. The engineer further states that, in response, West Canyon informed him that it did not intend to use the specified controllers but would supply an alternate system. The Johnson representative also states that he is an exclusive representative for the firm's equipment in the Salt Lake City area and indicates that, based on his own advisory work with GSA on the boiler replacement project, successful alternate performance through reprogramming the present controllers is not possible due to insufficient remaining memory capacity. In any event, he notes that, even if such reprogramming were possible, it would have to be done by Johnson personnel, and West Canyon has not sought out the manufacturer for this purpose. ESCO also suggests that the fact that West Canyon's bid price was below the government's estimate is a further indication that its bid is nonresponsive.

In response, GSA maintains that, since West Canyon's bid took no exception to the controller requirement and was otherwise responsive on its face, and since the firm was determined to be responsible and had verified its bid price, the award was proper. In conjunction with the verification of West Canyon's bid price, the agency reports that it questioned the firm about how the specifications relating to Johnson controllers would be met and, in response, West Canyon stated that, although the firm had not sought a price quotation from Johnson, it understood the specifications and intended to comply with them. The agency further notes that the information relied upon by ESCO postdates the award to West Canyon and merely indicates that the awardee had declined to work with a particular supplier. Finally, GSA submits that whether the awardee's performance is in compliance with the IFB specifications is a matter of

contract administration and indicates that the agency intends to monitor performance to insure that all of its specifications are, in fact, met.

ESCO's reliance on a "substantial doubt" analysis of bid responsiveness apparently stems from the protester's misunderstanding of our decision in CCL, Inc., B-228094.2 et al., Feb. 9, 1988, 88-1 CPD ¶ 126, which it cites in support of its arguments; in that case we upheld the agency's rejection of a bid as nonresponsive because, by its own terms, the bid failed to provide firm fixed prices for all of the system components listed in the IFB as required by the solicitation. Here, on the other hand, the bidders were only required to provide a lump-sum bid price for the boiler replacement project, which West Canyon did without qualification. There was no requirement for separate component bid price or for quotations from suppliers, as suggested by the protester, or any requirement to specify which boiler controllers a bidder intended to use. Thus, to the extent that ESCO contends that the awardee's bid was nonresponsive with respect to the Johnson controller requirement, the protest is denied; in setting forth a lump-sum price as required, West Canyon's bid constituted an unequivocal offer to comply with all material requirements of the IFB and was, therefore, responsive. Tom Page & Co., Inc., B-231723, Sept. 14, 1988, 88-2 CPD ¶ 246.

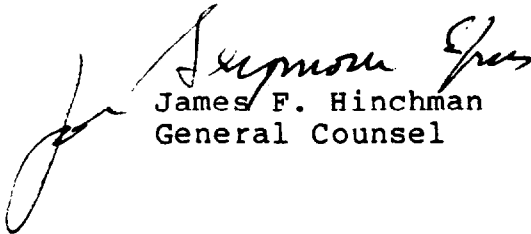
Insofar as ESCO contends that, in light of the information developed after award, West Canyon does not intend to perform in accordance with the IFB specifications, the protest is dismissed. The awardee has obligated itself to comply with the requirements relating to controllers. Whether the firm actually meets these requirements involves a matter of contract administration which is the responsibility of the contracting agency, not this Office. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1988); Tom Page & Co., Inc., B-231723, supra.

Further, the protester's allegation that West Canyon's low bid price, which was confirmed by GSA, is indicative of nonresponsiveness to the controller requirements is without merit. Such allegations do not give rise to responsiveness issues; rather, a prospective contractor's ability to perform in accordance with the specifications at the price it bid may properly be a matter of responsibility for the agency to determine before contract award. American Maid Maintenance, B-225571, Jan. 9, 1987, 87-1 CPD ¶ 47. Our Office will not review an agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procuring officials or that definitive

responsibility criteria have not been met. Id. Neither exception has been alleged in this case.

Finally, in its comments on the agency report, ESCO suggests that West Canyon rendered its bid nonresponsive on February 1 by offering a 30-day extension of its bid acceptance period "on the provision that no material suppliers pass along material price increases to us." Where a bidder qualifies an extension to its bid acceptance period by conditioning it upon a change in a material term of its bid, such as price, the bidder is ineligible for award after the original bid expires. Kos Kam, Inc., B-221806, May 14, 1986, 86-1 CPD ¶ 460. However, in this case, West Canyon's original unqualified bid was open for 60 days from the December 21 bid opening--i.e., until February 19--and award was made on February 16 during the original acceptance period; thus, the award was proper.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel